BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL L. WHITE	)	
Claimant	)	
VS.	)	
	)	Docket No. 180,691
PAYLESS SHOE SOURCE	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent requested Appeals Board review of Administrative Law Judge Bryce D. Benedict's October 27, 1998, Award. Appeals Board Member Don Ramsay recused himself from these proceedings, and in his place, Bryce A. Abbott was appointed Appeals Board Member Pro Tem. The Appeals Board heard oral argument in Topeka, Kansas, on June 2, 1999.

APPEARANCES

Claimant appeared by his attorney, Kurt A. Level, of Overland Park, Kansas. Respondent, a qualified self-insured, appeared by its attorney, James C. Wright of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jeff K. Cooper of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant a 72.5 percent work disability. Respondent appeals and raises the following issues for Appeals Board review. First, respondent contends the Administrative Law Judge should have admitted, as part of the record, the deposition testimony of claimant's treating physician, Michael T. McCoy, M.D. Second, respondent contends claimant's work-related injury is a scheduled right lower extremity injury and not a whole-body injury. Third, even if it is found claimant suffered a whole body injury, he is limited to permanent partial disability benefits based on his functional impairment because the respondent terminated claimant for cause not associated with his work injury. Fourth, claimant is not entitled to a work disability because he failed to establish his entitlement to a work disability by credible evidence. Fifth, the respondent contends the medical opinions of the Administrative Law Judge's appointed independent medical examiner are limited to functional impairment ratings, unless supported by the independent medical examiner's testimony.

In his brief, the claimant contends the greater weight of the evidence proves claimant, because of his severe debilitating work-related injuries, is realistically unemployable. Therefore, claimant argues he is entitled to a permanent total disability award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

The Appeals Board finds the Award, in respect to claimant's entitlement to a 72.5 percent work disability, should be affirmed. But the Award should be modified to reflect that claimant was not entitled a work disability until after his February 22, 1995, surgical procedure. The record as a whole does not establish, that before this second surgical procedure, claimant's right lower extremity weakened to a point where he walked with an altered gait and thereby developed a permanent injury to his low back.

Further, the Appeals Board concludes the Administrative Law Judge's Award sets out findings of fact and conclusions of law that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions in this Order. Accordingly, the Appeals Board adopts those findings and conclusions as it own that are not inconsistent with this Order.

Should claimant's treating physician's deposition testimony be admitted as part of the record?

Respondent's terminal date for submission of evidence in this case was September 28, 1998. Respondent scheduled the deposition testimony of claimant's treating physician, Michael T. McCoy, M.D., for October 2, 1998. This date was scheduled and agreed upon without objection by claimant's counsel. Not until respondent started questioning the doctor at the deposition did claimant object to the deposition on the basis that it was being taken outside respondent's terminal date. The Administrative Law Judge sustained claimant's objection and denied respondent's request to include the doctor's deposition testimony in the record.

Respondent argues that it had a difficult time scheduling the doctor's deposition because of his schedule and the schedule of the attorneys involved in this case. Also, respondent argues, if claimant had a problem with the date of the deposition, he had an opportunity to object to the deposition being taken outside respondent's terminal date before the date of the deposition. But claimant did not object, and respondent assumed because the deposition was only scheduled four days after his terminal date that there was no problem with the date.

The Appeals Board recognizes the Administrative Law Judge's need to set terminal dates in order to control their dockets and to finalize awards in a timely manner. But the Appeals Board also understands and finds parties sometimes have problems setting a date when all parties and the doctor are available for a deposition. In this particular case, the claimant agreed, without objection, to a date to take the doctor's deposition that was beyond respondent's terminal date. The Appeals Board finds it was reasonable for the respondent, under these circumstances, to believe that the claimant had no objection to taking the deposition only four days after its terminal date. The Appeals Board acknowledges that the better procedure for the respondent to follow would have been to request an extension of the terminal date before he took the doctor's deposition and before his terminal date expired. The Appeals Board, however, finds, under these circumstances, that the respondent's requested four-day extension of its terminal date should be granted and the deposition of Michael T. McCoy, M.D., dated October 2, 1998, should be and is hereby made a part of the record.

Is claimant's injury a scheduled or a whole body injury?

On May 8, 1993, claimant suffered a work-related right ankle injury. Respondent provided medical treatment for the injury primarily through orthopedic surgeon Michael T. McCoy, M.D., who treated claimant from May 17, 1993, through November 30, 1994. Claimant had previously sustained a severe broken right leg in a 1972 motorcycle

accident. The May 8, 1993, work-related accident caused a dormant osteomyelitis condition (bone infection) to reoccur. On June 29, 1993, Dr. McCoy preformed a surgical debridement of claimant's right ankle. For 30 days after the surgery, claimant received IV antibiotic treatment for the bone infection. And for another two years after the surgery, claimant remained on oral antibiotics.

The site of the surgical debridement procedure required coverage with soft tissue. Therefore, Dr. McCoy referred claimant to Marc R. Baraban, M.D., a plastic surgeon, to perform that surgical procedure. Dr. McCoy made the referral on November 30, 1994, and that was the last time Dr. McCoy saw the claimant. Dr. McCoy testified that claimant had made no complaints of back pain while he was under his treatment. Dr. McCoy also testified he would have limited claimant's permanent functional impairment to 20 percent of his right lower extremity. Additionally, Dr. McCoy would have released claimant without restrictions.

Dr. Baraban did not testify in this case. But the record indicates on February 22, 1995, he preformed surgery which consisted of debridement of the infected area then covered the right leg area with muscle tissue and skin grafts harvested from claimant's left leg.

After this surgery, claimant testified his right leg became more tender. Also, he was not able to walk for any period of time, and his right leg on occasion would buckle causing him to fall. Claimant then had started using a cane to walk causing his back to become symptomatic.

At claimant's attorney's request, orthopedic surgeon Edward J. Prostic, M.D., examined and evaluated claimant on April 29, 1996. Dr. Prostic was the only physician to testify in this case that had examined claimant after the February 22, 1995, operation. He found claimant with a severe deformity of the right lower leg and severe restriction of the right ankle and foot range of motion. Claimant walked with a limp that had aggravated and made symptomatic his underlying degenerative disc disease of the lumbar spine. The doctor restricted claimant from work requiring standing more than 20 minutes per hour or walking more than 10 to 15 minutes per hour. Additionally, claimant was restricted from preforming duties requiring squatting, kneeling, or climbing. As a result of the combination of a painful stiff right leg and the aggravated low-back disease, the doctor found claimant had a 40 percent whole body permanent functional impairment.

The Administrative Law Judge appointed P. Brent Koprivica, M.D., to perform an independent medical examination of claimant. The appointment was made pursuant to K.S.A. 1996 Supp. 44-510e on December 17, 1996. The Administrative Law Judge's order requested a "rating of such impairments that in the physician's opinion resulted

from claimant's work injury." Dr. Koprivica saw claimant once on March 25, 1997. He found claimant to have complaints of disabling pain in his right lower extremity resulting from the chronic osteomyelitis and subsequent surgeries. The doctor also found claimant to have a altered gait resulting from the lower extremity injury. The altered gait had caused chronic low-back pain. Dr. Koprivica found claimant had a 24 percent whole body function impairment for the right lower extremity and a 9 percent whole body functional impairment for the low back. These two functional impairments were combined for a 31 percent whole body functional impairment rating.

The Appeals Board is persuaded, by the medical evidence and claimant's testimony, that claimant's low-back injury was the natural and probable consequence of his right leg injury resulting in a whole body functional impairment.[1] Claimant's whole body functional impairment rating is found to be 35.5 percent by equally weighing the functional impairment opinions of Dr. Prostic and Dr. Koprivica.

Did respondent terminate claimant for cause not related to his work injury?

After claimant's first surgery on June 29, 1993, respondent returned claimant to light-duty work. Although the record is somewhat unclear, the Appeals Board finds that claimant testified he returned to light-duty work following 30 days of IV antibiotic treatment which would have returned claimant to work on or about August 1, 1993. Claimant testified he sat at a table with his right leg propped up on a chair for four and a half to five weeks. He did nothing for 10 hours per day, four days a week and was paid the same wage he was paid before his injury. Finally, the respondent had him sit at the desk and put labels on shoe polish.

Claimant testified the respondent brought him into an office and terminated him on December 10, 1993. Claimant testified he was not given a reason for the termination. But after he was terminated, he was told by some other employees that the reason he was terminated was that two male employees and three women employees, who claimant had worked with, had complained to the respondent that claimant was harassing them.

At the regular hearing, respondent's attorney asked claimant about some ten or more situations where claimant allegedly threatened or sexually harassed fellow employees. The claimant denied that any of those situations had occurred. The respondent did not offer any evidence as to the reason claimant was terminated.

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[1] *See* Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

The Appeals Board concludes the record as a whole does not prove the reason for claimant's termination. Therefore, the Appeals Board finds claimant is entitled to a work disability because he was placed in an accommodated job earning a comparable wage and the respondent terminated the claimant from that accommodated job for reasons not proved by the record. Once the claimant loses an accommodated job, the no work disability presumption may be rebutted. Otherwise, an employer could accommodate an injured worker, therefore invoking the presumption, and then discharge the worker and use the presumption in an effort to avoid a work disability.[2]

Did claimant prove a work disability?

Claimant's attorney hired vocational expert Michael J. Dreiling to interview claimant and to express an opinion on claimant's ability to preform work and earn wages in the open labor market.[3] Utilizing Dr. Prostic's work restrictions, Mr. Dreiling found claimant had lost 90 percent of his ability to preform work and lost 55 percent of his ability to earn wages in the open labor market.

Respondent argues that Mr. Dreiling's opinions are flawed because he used Dr. Prostic's permanent work restrictions as prohibiting claimant from working outside those restrictions. Respondent contends that Dr. Prostic admitted claimant could perform work outside those permanent work restrictions. Respondent argues the permanent work restrictions imposed by Dr. Prostic are only advice and suggestions and do not prohibit claimant from working outside the restrictions.

The Appeals Board recognizes Dr. Prostic agreed that the permanent restrictions he placed on claimant were suggestions and claimant could try to do something that exceeded those restrictions. But the Appeals Board also recognizes that neither Dr. Prostic nor any other doctor can prevent an injured worker from attempting to exceed the restrictions imposed. The permanent restrictions placed on an injured worker by a physician are guidelines in an attempt to prevent further injury to the worker. Whether the injured work chooses to work within those restrictions is a personal decision only the injured worker can make.

The Appeals Board finds, however, that when determining an injured worker's entitlement to a work disability, the permanent restrictions imposed by the physician are relevant and necessary to that determination. Accordingly, the Appeals Board finds that Mr. Dreiling's opinion on claimant's loss of ability to perform work and loss of ability to

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[2] *See* Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 839, 936 P.2d 294 (1997).

[3] *See* K.S.A. 1992 Supp 44-510e.

earn wages in the open labor market is uncontradicted and has not been shown as untrustworthy.[4] Therefore, the Appeals Board adopts Mr. Dreiling's work disability opinion of 72.5 percent found by averaging a 90 percent labor market loss with a 55 percent wage loss.[5]

Is the Administrative Law Judge's appointed independent medical examiner's opinion limited to functional impairment, unless supported by the independent medical examiner's testimony?

As already noted, the Administrative Law Judge appointed Dr. Koprivica to perform an independent medical examination of claimant. The order was made pursuant to K.S.A. 1996 Supp. 44-510e on December 17, 1996. The request was for a "rating of such impairments that in the physician's opinion resulted from claimant's work injury." Dr. Koprivica's report was entered into the record but his deposition testimony was not taken. Respondent argues the only portion of Dr. Koprivica's report that can be part of the evidence in this case is the functional impairment rating. It contends any other medical opinions contained in Dr. Koprivica's report would be inadmissible because they are not supported by the independent medical examiner's testimony.[6] The Appeals Board disagrees.

In this case, before the independent medical examiner could determine functional impairment, the doctor had to make a determination of whether claimant had suffered a permanent back injury as a result of an altered gait caused by claimant's initial right leg injury. Accordingly, the Appeals Board concludes, under this circumstance, in addition to the functional impairment rating, the independent medical examiner's opinion on whether claimant's low back was permanently injured as a result of the altered gait is also admissible without supporting independent medical examiner's testimony.

Is claimant permanently and totally disabled?

The claimant argues the testimony of vocational expert Michael J. Dreiling establishes that claimant is incapable of engaging in any type of substantial employment and he is, therefore, permanently and totally disabled.[7]

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[4] *See* Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978)

[5] *See* Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990)

[6] *See* K.S.A. 44-519.

[7] *See* K.S.A. 1992 Supp. 44-510c(d)(2).

The Appeals Board finds Mr. Dreiling's opinion that claimant is realistically unemployable in the open labor market was influenced primarily by the determination of the Social Security Administration that claimant was entitled to social security disability. In addition to claimant's work related injuries, he also has been diagnosed with depression. Furthermore, during the interview with Mr. Dreiling, claimant indicated he now had complaints and problems in both arms and hands not associated with his work injuries.

Based on Mr. Dreiling's experience with social security disability hearings, he testified he did not believe claimant would have been found disabled by the Social Security Administration based only on the permanent restrictions imposed by Dr. Prostic for claimant's right leg and back injuries. Mr. Dreiling went on to testify there were jobs available in the open labor market that claimant could preform within his permanent restrictions. For example, in the security field or jobs monitoring systems, claimant could earn minimum wage.

The Appeals Board concludes, based on the permanent restrictions only associated with the claimant's right lower extremity and back, claimant has the ability to perform sedentary jobs and those jobs are available in the open labor market for him to earn a minimum wage. But claimant currently is not actively seeking any type of employment.

Accordingly, the Appeals Board concludes claimant is not permanently and totally disabled and the award is limited to a 35.5 percent functional impairment until March 1, 1995, and a 72.5 percent work disability thereafter.

AWARD

WHEREFORE it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated October 27, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Daniel L. White, and against the respondent, Payless Shoe Source, a qualified self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on May 8, 1993, and based upon an average weekly wage of $476.76.

Claimant is entitled to 25 weeks of temporary total disability compensation at the rate of $299 per week or $7,475.00, followed by 69.43 weeks of permanent partial disability compensation at the rate of $112.84 per week or $7,834.48 for a 35.5%

permanent partial functional disability, followed by 320.57 weeks of permanent partial disability compensation at the rate of $230.45 per week or $73,875.36 for a 72.5% permanent partial work disability, making a total award of $89,184.84.

As of September 30, 1999, there is due and owing claimant 25 weeks of temporary total disability compensation at the rate of $299 per week or $7,475.00, followed by 69.43 weeks of permanent partial compensation at the rate of $112.84 per week in the sum of $7,834.48, followed by 239.29 weeks of permanent partial compensation at the rate of $230.45 per week in the sum of $55,144.38, for a total of $70,453.86, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $18,730.98 is to be paid for 81.28 weeks at the rate of $230.45 per week, until fully paid or further order of the Director.

Pursuant to the stipulation of the parties, the Kansas Workers Compensation Fund is ordered to pay 80% of the Award.

All other orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectively dissent from the opinion of the majority in the above matter. The majority allowed the opinion of P. Brent Koprivica, M.D., to be considered for the purpose of deciding whether claimant's low back was permanently injured as a result of the altered gait. Dr. Koprivica was appointed by the Administrative Law Judge to perform an independent medical examination pursuant to K.S.A. 1996 Supp. 44-510e.

That statue allows the appointment of an independent health care provider by the Administrative Law Judge for the purpose of rendering an opinion regarding "the employee's functional impairment which shall be considered by the administrative law judge in making the final determination."

Dr. Koprivica's report was admitted into evidence without benefit of his testimony. K.S.A. 44-519 states:

> No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

Dr. Koprivica's report as a general rule is prohibited absent his supporting testimony. K.S.A. 1996 Supp. 44-510e allows a report without the doctor's supporting testimony only when considering the claimant's function impairment rating. In Sims v. Frito-Lay, Inc., 23 Kan. App. 2d 591, 933 P.2d 161 (1997), the Kansas Court of Appeals ruled that "K.S.A. 44-510e(a) merely creates a narrow exception to the general rules of K.S.A. 44-519."

The undersigned would allow the opinion of Dr. Koprivica to be considered regarding his functional impairment opinion but would prohibit consideration of Dr. Koprivica' opinion when dealing with any causality issues between claimant's altered gait from the right leg injury and claimant's low back symptoms. The majorities' decision to consider Dr. Koprivica's opinions for anything other than claimant's functional impairment rating violates K.S.A. 44-519.

BOARD MEMBER

c: Kurt A. Level, Overland Park, KS
James C. Wright, Topeka, KS
Jeff K. Cooper, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director